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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. [redacted] 79

STELLA CONNELL, individually, and on behalf of all persons similarly situated,

Appellant,

v.

JAMES M. HIGGINBOTHAM, Superintendent of the Orange County Board of Public Instruction, LOUISE BREEZE, Chairman of the Orange County Board of Public Instruction, and LOWELL CLEMENTS, RAYMOND H. BASSETT, WILLIAM D. LaRUE, HARLEY THOMPKINS, MRS. LEE K. DAVIES and STEWART M. SCHAFFER,

Appellees (Defendants).

FLOYD T. CHRISTIAN, Commissioner of Education, State of Florida,

Appellee (Intervenor)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF OF APPELLEES

JAMES W. MARKEL
Mairs, Graham & Markel
Post Office Box 999
Winter Park, Florida

RIVERS BUFORD, JR.
General Counsel
State Board of Education
347 Miles Johnson Building
Tallahassee, Florida

STEPHEN MARC SLEPIN
Counsel, State Board of Education
347 Miles Johnson Building
Tallahassee, Florida

ATTORNEYS FOR APPELLEES

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OCTOBER TERM, 1970

NO. 1113

STELLA CONNELL, individually, and on behalf of all persons similarly situated,

Appellant,

v.

JAMES M. HIGGINBOTHAM, Superintendent of the Orange County Board of Public Instruction, LOUISE BREEZE, Chairman of the Orange County Board of Public Instruction, and LOWELL CLEMENTS, RAYMOND H. BASSETT, WILLIAM D. LaRUE, HARLEY THOMPKINS, MRS. LEE K. DAVIES and STEWART M. SCHAFFER,

Appellees (Defendants).

FLOYD T. CHRISTIAN, Commissioner of Education, State of Florida,

Appellee (Intervenor)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

STATEMENT OF THE CASE

Floyd T. Christian, appellee-intervenor, accepts the appellant's statement of the case as presented at pages 4-10 of Brief of Appellant.

Appellees would observe, however, that appellant was apparently aware of the subject oath upon her assumption of duties, *Appellant's Jt. App.*, pp. 34 [140], 143 [order of court], but sought out this cause as a test case.

ARGUMENT

James M. Higginbotham, et al., appellees, and Floyd T. Christian, intervenor-appellee, respectfully commend to this Court a foundational argument, and would then proceed to examine the more salient of appellant's arguments.

I.

ACTION OF DISTRICT COURT

By Judgment and Order of October 30, 1969, (*Appellant's Jt. Appendix*, pp. 141-158) the Three-Judge United States District Court for the Middle District of Florida did the following:

1. First, the lower Court held the plaintiff-appellant, to be representative of the class of all state employees, to which class the requirement of oath-taking (Section 876.05, Florida Statutes) is indiscriminately applicable. (Opinion pp. 6-7.) (*Appellant's Jt. App.*, pp. 145-6)

2. Secondly, and foundational to judicial mutation of the statutory oath, the court held the provisions of the act to be severable. (Opinion p. 8.) The Court cited *United States v. Jackson*, 390 U.S. 570, 585 (1967), and noted the Florida Supreme Court's agreement with the severability doctrine as it related to this very statute. *Cramp v. Board of Public Instruction*, (Fla. 1962) 137 So.2d 528. To which law, and admitting a spate of supporting decisional law, appellant responds with *ipse dixit* that "since it is now clear [to appellant] that not just one, but between three and five of the five operative provisions . . . are unconstitutional," this Court "must" consider the law on the subject *de novo* and the raft of reported cases must be viewed as *tabula rasa*. (*Appellant's Jurisdictional Statement*, p. 25)

Risking ignoration of whatever Pythagorean nexus might, as alleged, obtain as between (a) "three and five of the five operative provisions" and (b) the disvalue of the controlling cases, these appellees urge the said cases as controlling still. (Certainly it would be the most circular of circular arguments to hold the statutory provisions unseverable because "the statute" is unconstitutional, if the unconstitutionality of the statute *in toto* is dependent upon a determination of severability. And to hold the statutory provisions unseverable, despite the case law, because "three" or more provisions strike appellant as unconstitutional would be a coercive *non sequitur*.)[1]

In fine, the statutory oath as upheld below is constituted of two independent, compound clauses—each of which is an intelligible compound proposition logically autonomous, however ideologically consonant. (See *Appellant's Jt. App.*, p. 153)

3. Citing to a raft of decisions invalidating oath provisions exacting declarations of non-membership in certain organizations, the lower Court struck down such exactions as appeared in the subject oath. (Opinion pp. 8-12.) (*Appellant's Jt. App.*, pp. 148-51)

4. The Court below, in recognition of the psychological datum that belief is a spring to behavior or at least that the two are functionally inextricable, held constitutional the provision, " . . . that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence . . . " (Opinion pp. 12-13.) (*Appellant's Jt. App.*, pp. 151-52)

[1] See, *American Communications Assn. v. Douds*, 339 U. S. 382 at 393 re. J. Holmes' and J. Reed's derogation of mathematical formulae as criteria of constitutional meaning.

The lower Court was not unaware that "As in *Cramp v. Board of Public Instruction* . . . [the Supreme Court does] not question the power of a state to take proper measures safeguarding the public service from disloyal conduct." *Baggett v. Bullitt*, 377 U. S. 360, 380, (1964) (Opinion of Clark, J.). For clearly the Bill of Rights has not been converted into a "suicide pact." *Terminello v. Chicago*, 337 U. S. 1, 37 (1949). And with "education . . . perhaps the most important function of state and local governments," *Brown v. Board of Public Education of Topeka*, 347 U. S. 483, 493, a function which is the "principal instrument in awakening the child to cultural values . . ." *Ibid*, the lower Court sustained a mild measure somewhat protective of the community's interest in its posterity. (Opinion pp. 12-13.)[2] (*Appellant's Jt. App.*, pp. 151-52)

"Indeed, it is plain that a state has a clear interest in assuming '. . . careful and discriminating selection of teachers' by its publicly supported educational institutions. See *Shelton v. Tucker*, 364 U. S. 479, at 495-496 . . . (dissenting opinion of Frankfurter, J.); see also majority opinion at 485 . . ." *Knight v. Board of Regents of University of State of New York*, (S.D.N.Y. 1967) 269 F.Supp. 339, at 342, aff'd. 390 U. S. 36 (1968).

5. Finally, the lower Court found nothing destructive of, nor antithetic to, First or Fourteenth Amendment freedoms by requiring of government employees the taking of an oath in support of the constitutions of the United States and Florida. Indeed this Court has, albeit in dicta, expressly

[2]See, Weaver, *The Ethics of Rhetoric*, "Dialectic and Rhetoric at Dayton, Tenn." at pp. 36-38, for arguments of Clarence Darrow (in the Leopold & Loeb case) and William Jennings Bryan (in the Scopes trial) testifying to the formidable effects of even subtle educational experiences.

sanctioned state exaction of an oath of support of the Constitution. *Bond v. Floyd*, 385 U. S. 116, 135 (1966).

One of the most succinct and applicable judicial statements on this limited subject issued in *Gilmore v. James*, 274 F. Supp. 75, 92 (1967):

> "Oaths in support of the government are not abhorent to the Constitution. Indeed the Constitution provides one [citing U. S. Const. Art. II, §7]."

To appellant's assertion that the oath's import is unfathomable or dangerously vague, the concerning opinion of Mr. Justice Harlan (joined by Chief Justice Burger) in *Cole v. Richardson* and *Richardson v. Cole* (March 16, 1970) 38 Law Week 3362, 3363, is, we submit, responsive:

> ". . . almost any word or phrase may be rendered vague and ambiguous by dissection with a semantic scalpel."
>
> * * *
>
> "I think it can be fairly said that subscribing to the instant oath subjected appellant to no more than an amenity. No First Amendment considerations are, in my view, at all involved in this case. This oath does not impinge on conscience or belief, except to the extent that oathtaking as such may offend particular individuals . . ."

The District Court in *Hosack v. Smiley*, (D. C. Colo. 1967) 276 F.Supp. 876, aff'd 390 U. S. 744 (1968), treated of alleged vagueness or inhibition of precious historical freedoms by tersely observing that an oath to support the constitutional process does not stagger the understanding of "men of common intelligence," (citing *Cramp v. Board of Public Instruction*, 368 U. S. 278, 287) for it is "plain, straightforward and unequivocal." *at* 878.

Note should be made of two recent decisions rendered in approbation of such oaths: *Knight v. Board of Regents of University of the State of New York* (S.D.N.Y. 1967) 269 F. Supp. 399, aff'd 390 U. S. 36 (1968); *Stewart v. Washington* (D.D.C. 1969) 301 F. Supp. 610, 611-612. Indeed, the oath sanctioned in the *Knight* case, *supra*, required one to pledge to "preserve, protect and defend"—beyond merely supporting—the Constitution. *Knight, supra.*

6. The lower Court, thereupon, upheld such provisions of Section 876.07, Florida Statutes, as are apposite of the valid provisions of the oath prescribed in and by Section 876.05, Florida Statutes. (Opinion pp. 14-15.)

II.

THE LOYALTY OATH *PER SE*

The Supreme Court of the United States has not declared loyalty oaths, so-called, to be generically unconstitutional.

Indeed, Article II, §7 of the Constitution of the United States prescribes the following presidential oath:

> "I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."

Moreover, Article VI, §3 of the Constitution of the United States requires that the "senators and representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution . . . "

Accordingly, the Congress of the United States, on June 1, 1789, enacted Statute 1, Chapter 1, §1:

> "* * * That the oath or affirmation required by the sixth article of the Constitution of the United States, shall be administered in the form following, to wit: 'I A.B. do solemnly swear or affirm (as the case may be) that I will support the Constitution of the United States."

In purely formal terms, then, the loyalty oath—to support, to protect, to preserve, to defend the Constitution—is resident in the Constitution and found expression in the first Congress' first act. Apt, therefore, are the words of Chief Justice Marshall in *M'Culloch v. The State of Maryland*, 4 L.Ed. 579 at 600, uttered in another context:

> "It has been truly said that this can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognized by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation."

Even if we are unable to say with St. Augustine, *Nisi credideritis non intelligetis*,* we are at the very least compelled to agree with Chief Justice Marshall's charitable view that "it is conceived that a doubtful question . . . if not put at rest by the practice of government, ought to receive a considerable impression from that practice." *Ibid.*

In fine, though appellant anathematizes all manner of loyalty oath—escalating denigration from a description of such oaths as "not a significant matter" to "no substantive importance" (*Appellant's Brief*, p. 37) to a condemnation of "irrelevant restraint" [upon freedom] (*Id.* at 38)—the oath as

*"If you do not believe, you will not understand."

such is part and parcel of our Constitution and springs from the seed time of the republic.

Upon one ground or another, and in disparite contexts, this Court has upheld the requirement of a loyalty oath or affidavit, or even a disclaimer of disloyal activity. *Viz., American Communications Asso., CIO v. Douds*, 339 U. S. 382†; *Osman v. Douds*, 339 U. S. 846; *Gerende v. Board of Supervisors of Elections of Baltimore City*, 341 U. S. 56; *Garner v. Board of Public Works*, 341 U. S. 716; *Knight v. Board of Regents*, 390 U. S. 36, affirming 269 F.Supp. 339. See, also, *Bond v. Floyd*, 385 U. S. 116, 135.

Other and recent decisions not surprisingly upholding the generic constitutionality of loyalty oaths are as follows.

In *Knight v. Board of Regents of the University of the State of New York* (SD NY 1967) 269 F.Supp. 339, aff'd 390 U. S. 36, 19 L.Ed. 2d 812, the court upheld the constitutionality of a statutory oath which read:

> "I do solemnly swear (or affirm) that I will support the constitution of the United States of America and the constitution of the State of New York . . ."

The *Knight* court concluded, at 341:

> "• • • we interpret the statute to impose no restrictions upon political or philosophical expressions by teachers. . . . A state does not interfere with its teachers by requiring them to support the governmental systems which shelter and nourish the institutions in which they teach . . . Indeed, it is plain that a state has a clear interest in assuring ' . . . careful and discriminating selection of teachers' by its publically supported educational institutions. Shelton v. Tucker, 364 U. S. 479 . . ."

†But see, *U.S. v. Brown*, 381 U.S. 437

In *Hosack v. Smiley* (D. Colo. 1967) 276 F.Supp. 876, the court upheld the constitutionality of an oath which read:

> "I solemnly swear or affirm that I will support the Constitution of the State of Colorado and of the United States of America and the laws of Colorado and of the United States of America."

The subject oath was found to be "plain, straightforward and unequivocal," at 878, and therefore the court held "that an oath to support the constitution and laws of the state and nation does not and can not run counter to First Amendment freedoms." at 880.

Also, *Stewart v. Washington* (D.C. 1969) 301 F.Supp. 610 and *Gilmore v. James* (ND Tex. 1967) 274 F.Supp. 75.

The residency of the loyalty oath in the Constitution of the United States and in the first Congress' first enactment is not without compelling conceptual and historical rationale.

An appropriate point of departure is Mr. Justice Frankfurter's insightful observation in *Minersville School Dist. v. Gobitis*, 310 U. S. 586 (1940) [overruled by *W. Vir. State Board of Education v. Barnette*, 319 U. S. 624 (1943)]:

> "The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment if fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization. 'We live by symbols.'" *at 596.*

There is of this nothing abstruse. "In its simplest definition, a symbol is a conventional sign. A sign represents or signifies: it conveys a meaning. . . . All words are symbols . . . their

power is indirect, through their effect on men." Ross, SYMBOLS & CIVILIZATION (1957) 164.

Mr. Justice Frankfurter's observation—with its contemporary referent in the case at bar—is of the first importance. As Professor Ross insists:

> "The bonds of society are the shared symbols, rituals, values, and beliefs of its members, and it is in these that the 'meaning' of the society is contained. . . . Personal freedom yields little of value outside a social order and tradition; it can in fact be guaranteed only in a political and social order, and the value of individual differences, of choice and free intelligence, and the arts and sciences which they nurture, are dependent on shared ritual, symbol and emotion. Our social roots are often forgotten because they are firmly embedded and raise no practical problem. If we forget them overlong, we may uproot them, and with them, ourselves." SYMBOLS & CIVILIZATION, at 172.

In fine, the emotive *sine qua non* of social life is symbolized by such oaths as the one at bar, and appellant did not present to the lower Court evidence of a societal disaffection indicative of such symbols' desuetude. Hence, even as there is no rationale according to which this Court should encourage such a disaffection by denigrating this oath, there is compelling reason for this Court to sanction an existing oath's operation.

Symbols of allegiance are both indicative of social cohesion and, absent massive disaffection, are in turn promotive of its continuation. Chief Justice Waite stated the matter in *Minor v. Happersett*, 88 U. S. 165-166 (1875):

> "The very idea of a political community, such as a nation is, implies an association of persons for the

> promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection. Allegiance and protection are, in this connection, reciprocal obligations. . . ."

Though representative of Nineteenth Century formulation, Chief Justice Waite's assertion is not to be doubted as a socio-political proposition of importance. And it is from this matrix that such compelling symbols as the instant oath spring.

Historically viewed, as noted by the Court in *Knight v. Board of Regents of University of State of New York* (SD NY 1967) 269 F. Supp 339, 341, "The statutory language of support of the constitutional governments can be substantially equated to that allegiance which, by the common law, every citizen was understood to owe his sovereign."

The court, at 341, cited to 1 *Blackstone's Commentaries* (Fifth Edition) 369:

> "Which occasions Sir Edward Coke very justly to observe, that all subjects are equally bounden to their allegiance, as if they had taken the oath; because it is written by the finger of the law in their hearts, and the taking of the corporal oath is but an outward declaration of the same."

Chief Justice Vanderbilt, of the New Jersey Supreme Court, in *Imbrie v. Marsh* (N.J.) 3 N.J. 578, 71 A.2d 352, 243, 18 ALR 2d 241, wrote:

> "The oath has played a significant part in government from the earliest times; thus we find Lycurgus saying to the Athenians: 'An oath is the bond that keeps the state together,' Oratio in Leocratem 80 and Montesquieu

> attributing the strength of the Romans to their respect for an oath: 'Such was the influence of an oath among these people that nothing bound them stronger to the laws. They often did more for the observance of an oath than they would have done for the thirst of glory or the love of their country,' The Spirit of the Laws, Book VIII, Chap. 13 . . . . "

Chief Justice Vanderbilt, citing to *Omychund v. Barker*, 1 Atk 21, 34 (ch 1744), at 243, declared:

> "No country can subsist a twelve-month where an oath is not thought binding; for want of it must necessarily dissolve society."

Thus, appellees hold the nescient dismissal of such oaths (as of "no substantive importance" or as "not a significant matter") to be quite short of the mark philosophically, sociologically and in point of history.

Because, as noted hereinbefore, "appellant did not present to the lower Court evidence of a societal disaffection indicative of such symbols' [as oaths'] desuetude . . . There is no rationale according to which this Court should encourage such disaffection" by invalidating the loyalty oath as such.

The foregoing notwithstanding, appellant urges the invalidation of the oath provision *"I will support the Constitution of the United States and of the State of Florida,"* on the mind-bending ground that it "is really a negative test oath masquerading as an affirmative oath of office." (*Appellant's Brief*, p.24) Doubting the conceptual legerdemain by which this might have been accomplished, appellees believe the circumstantial evidence and authorities hereinbefore cited to validate the subject provision. For as Henry David Thoreau put it: "Some circumstantial evidence is very good, as when you find a trout in your morning milk" . . . or a Consti-

tutional oath challenged as unconstitutional *per se!*

III.

"NEGATIVE" OATH PROVISION

Objecting to the so-called "negative loyalty oath" provision of §876.05, Florida Statutes, *"I do not believe in the violent overthrow of the Government of the United States or of the State of Florida by force or violence,"* appellant indulges her ideological absolutism by declaring (at p. 29, *Appellant's Brief*):

> "All such disclaimers or negative loyalty oaths, cast in political terms offend the First and Fourteenth Amendments' freedoms of expression, belief and privacy. Even the clearest and most precise disclaimer imaginable would be unconstitutional, particularly when demanded indiscriminately of all government employees or beneficiaries."

Appellees would caution that in jurisprudence, as "in philosophy . . . [and] daily life, cocksureness is a function of ignorance and dunces step in where sages fear to tread." *Joad, PHILOSOPHY* (Fawcett 1966) 10.

Lest we be swept over an emotional falls by a niagara of well-intentioned libertarian ideology, it is well to keep our feet on high and dry constitutional terrain.

The honorific *freedom of belief* which appellant finds offended by the abovestated provision is, after all, a judicial construct and, however salutary that artisanship, ought not be allowed *exclusive* occupancy of a given dialectical circumstance. The Court should employ the construct prudently under the circumstances of a given case. See, *United States v. Robel*, 389 U.S. 258, 282-3 (White, dissent)

First, the instant cause concerns, and was raised by, a school teacher. As the lower Court observed:

> What a person believes has a central effect on the views and actions taken by that person. . . . This principle has exceptional significance when applied to school teachers. Teachers, particularly those of the lower grades, are dealing with young and very impressionable minds. Who can doubt that the teacher is one of the most important persons in the life of any youngster or that the views expressed by the teacher have great impact on the developing attitudes of the child. . . . [T]he potential for the exertion of the principles of violent overthrow . . . on the younger, inferior mind does exist. This potential presents grave dangers to the state's legitimate interest in educating youth and in the principles of ordered government and the orderly process for change. The state may take reasonable steps to prevent frustration of that end. Cf. *American Communications Association v. Douds*, 339 U. S. 382 (1950)". *Judgment & Order*, Oct. 30, 1969 at *Appellant's Jt. App.*, p.152.

One need not hold to the supposedly scientific and widely-accepted views of Prof. John B. Watson, expressed in his famed *BEHAVIORISM* (1924) that no belief is private inasmuch as all belief is subvocal action representing muscular activity and physical inclination. It will do merely to recognize commonsensically, or empirically if you will, that the beliefs of those employed to express and inculcate educated beliefs (in the interest of cultural transmission) are important.

In *Brown v. Board of Public Education of Topeka*, 347 U. S. 483, 493, this Court expressed the role of education as "perhaps the most important" governmental function and the "principal instrument in awakening the child to cultural values . . . ."

Appellees are reluctant to accede, then, to the notion that the state is utterly powerless to condition employment of its children's teachers on an oath forswearing belief in "the overthrow of the Government of the United States or of the State of Florida by force or violence . . . ."

Appellant has cited an impressive array of decisions invalidating various "negative" oaths—decisions not without their attendant dissenting opinions, it must be noted. And it may be that this marked movement will be construed to have dispositively trampled underfoot the state's presumed authority to protect its posterity from the insinuation of revolutionists or votaries of violence into the school system. As Abraham Lincoln once advised: "When you have an elephant by the tail and he wants to run, it's sometimes wise to let him." But appellees are constrained to call such a movement precisely what it appears to be: a perilously perambulating pachyderm.

In this case, to universalize a prohibition upon a so-called "negative" oath and thereby to paralyze the state's protective efforts would indeed seem to threaten conversion of the Bill of Rights into a "suicide pact." *Terminello v. Chicago*, 337 U. S. 1, 37.

Appellant's attempted *reductio ad absurdum* of the oath provision forswearing belief in the overthrow of the governments "by force or violence" by reference to the words of Jerome Skolnick (*Appellant's Brief*, p. 20) is little short of amazing. Playing upon Mr. Skolnick's ruminations upon the instrumental value of violence, appellant asks: "Could Mr. Skolnick conscientiously make this oath?" To which these appellees must stand mute; for the answer to that question is no more coercive of this Court's decision than would be the case if appellant had instead addressed the words of Alice's

Mad Hatter and asked if the subject oath would offend him. No one knows.

We do know, however, that, in Brand Blanshard's words, a "massiveness of common sense" is required to do justice to all interests here affected: the state's, the children's, the teacher's.

Yet, appellant fancifully poses such questions as: "What does loyal mean?" "If he vocally disagrees with the Chamber of Commerce image of Florida as a citrus and vacation paradise, is he [the teacher] being disloyal . . . . ?" (Appellant's Brief, p. 39) "What is meant by a change? Does this mean that the oath-taker must believe that domestic violence has been unnecessary to achieve political goals . . .?" These and other imponderables, according to appellant, parade through the subject statutory oath.

> "To so interpret the language of the Act is to extract more sunbeams from cucumbers than did Gulliver's mad scientist. And to conjure up such ridiculous questions, the answers to which we all know or should know are in the negative, is to build up a whimsical and farcical straw man which is not only grim but Grimm." *Baggett v. Bullitt*, 377 U. S. 360, at 383 (Clark dissenting.)

IV.

SEVERABILITY

The lower court struck certain provisions of §876.05, Florida Statutes, and upheld the constitutionality of the two provisions hereinbefore discussed. In so doing the court cited the decision of this Court in *United States v. Jackson*, 390 U. S. 570, 585:

> "The unconstitutionality of a part of an Act does not necessarily defeat . . . the validity of its remaining provisions."

The tests are: Would the legislature have enacted the provisions within its power, independently of those invalidated?, *Ibid*, and Is the remainder "an operative whole"? *Id* at 591.

The lower court answered these questions in the affirmative as did the Supreme Court of Florida in *Cramp v. Board of Public Instruction*, 137 So.2d 828, treating of this very statutory oath.

It is unblinkably clear that no matter how consonant all of the oath's provisions were, one with the other, the product of the lower court's order is an operative whole the legislature's interest in which is not seriously to be doubted. The excision of certain provisions by the lower court rendered the statutory oath neither grammatically infirm nor beyond the respect or desire of a reasonable man or legislator. The remaining provisions of §876.05, Florida Statutes—swearing or affirming support; and forswearing belief in violent overthrow, of government—and of §876.07, Florida Statutes, are very much an intelligible whole to which appellant's attack has been, accordingly, directed. See Also, *Champlin Rfg. Co. v. Commission*, 286 U.S. 210, 86 ALR 403; *Harris v. Bryan* (Fla. 1956) 89 So.2d 601.

V.

HEARING

Appellant protests the absence of a statutory hearing procedure or other exculpatory means by which "the nonsigner might explain his actions and vindicate his loyalty." (*Appellant's Brief*, p. 44)

However consolatory such a mechanism might prove, it is to be doubted that its absence renders the subject statutes unconstitutional.

As stated by the court in *Hosack v. Smiley* (D. Colo. 1967) 276 F.Supp. 876, 880-881, a hearing is not always and under all circumstances an indispensible condition to constitutionality, *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U. S. 886, and with respect to a loyalty oath non-signer (1) there are no accusers or antagonists to confront, (2) there is no charge to disprove or to traverse and (3) a press conference would serve the purpose.

One must wonder if all statutes, or at least all statutes relating to qualifications (for office, for voting, etc.) are infirm absent a hearing at which an annointed expositor of the law's univocal meaning defines the statutory law from alpha to omega.

Appellees believe not.

VI.

CONCLUSION

The instant cause is apparently a test case, *Appellant's Jt. App.*, pp. 30 [121], 33 [127], 34 [140-Order of Ct.], 143 ["Facts," Judgment and Order, Oct. 30, 1969], brought by one knowledgeable of the oath but adverse to the oath concept.

The appellees submit: (1) The state has a compelling interest respecting the employment of teachers and the education of its children; (2) The "affirmative" provision of the subject oath is constitutionally immaculate; (3) The "negative" provision of the oath fairly and intelligibly reflects the state's legitimate interest; (4) The provisions of the statutory oath, including the two aforementioned, are severable without impairment of the oath *per se*.

Appellees subscribe to the notion that "the [judicial] decision" ought to be "made to fit as far as possible the expectations" of society, *Cohen, Reason and Law* (Free Press

1950) 79, for truly "expectation is the mother of obligation," *deJouvenel, Sovereignty* (Cambridge Univ. Press 1957) and justice.

Appellees respectfully request that the judgment of the lower court be affirmed.

Respectfully submitted,

STEPHEN MARC SLEPIN
Counsel
State of Florida
Board of Education
347 S. Duval Street
Tallahassee, Florida 32304

&

RIVERS BUFORD, JR.
General Counsel
State of Florida
Board of Education
347 S. Duval Street
Tallahassee, Florida 32304

JAMES W. MARKEL
Mairs, Graham & Markel
Post Office Box 999
Winter Park, Florida 32789

ATTORNEYS FOR APPELLEES

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